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Agora (Continued): Future Implications of the Iraq Conflict: Editors' Note

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AGORA (CONTINUED): FUTURE IMPLICATIONS OF THE IRAQ CONFLICT

EDITORS' NOTE

This Agora continues the discussion of future implications of the Iraq conflict begun in the previous issue of the *Journal*.¹ While the contributions to the first installment of the Agora concentrated mainly on the decision to initiate combat against Iraq in spring 2003 and the implications thereof for the restraints on use of force in the UN Charter and customary international law, the present pieces shift the focus to the management of the transition within Iraq in the aftermath of the military intervention.

Each contribution deals with matters that were not only contested but very much in flux as of the time that this Agora went to press in late October 2003. The situation in Iraq was difficult to characterize in terms of the standard categories of international law. "War" in the classic sense had died down, but peace had not yet arrived: though President George W. Bush declared an end to major combat on May 1, 2003,² military operations continued thereafter, as did significant casualties to coalition forces and among the Iraqi population and UN and other foreign personnel, up to and including the closing date for this issue.³ The UN Security Council had referred to the United States and the United Kingdom as "occupying powers" in the international law sense,⁴ but the relevance of aspects of the traditional international law of occupation remained debatable.⁵ The occupying powers and the Security Council had reaffirmed a commitment to the sovereignty of Iraq and the right of the Iraqi people to determine their own future through a representative government, but the modalities for the prospective exercise of Iraqi sovereignty had not been settled.⁶

Carsten Stahn begins the Agora with a fresh perspective on some of the questions of UN Charter law that animated the discussion in the previous issue. His main theme is how to ascertain a "collective will" when the UN Security Council does not express itself in the forms provided for in the Charter. Stahn interprets the U.S.-led intervention in light of objectives previously established by the Security Council and argues for a revitalization of the Council in the threefold capacity of normative framer of the collective will, forum for reasoned interstate discourse over the use of force, and organizer of the conduct of postconflict relations.

Thomas D. Grant addresses the evolving practice of the UN Security Council in facilitating the transition to an internationally recognized, representative government in Iraq. He examines the allocation of responsibilities among the Coalition Provisional Authority (the occupying powers), the Governing Council of Iraq (an interim administration of selected Iraqis), and the UN special representative, as reflected in Resolutions 1483, 1500 and 1511, while

¹ *Agora: Future Implications of the Iraq Conflict*, 97 AJIL 553–642 (2003).

² Address to the Nation on Iraq from the USS *Abraham Lincoln*, 39 WEEKLY COMP. PRES. DOC. 516 (May 1, 2003).

³ The deaths of two U.S. soldiers in a bomb attack on October 29, 2003, brought the total number of U.S. soldiers killed by hostile fire after May 1, 2003, to 116, thereby exceeding the 115 combat fatalities that had occurred before President Bush declared major combat operations at an end.

⁴ SC Res. 1483 (May 22, 2003), 42 ILM 1016 (2003), SC Res. 1500 (Aug. 14, 2003), and SC Res. 1511 (Oct. 16, 2003).

⁵ On these debates, see especially the contributions to the present Agora by David Scheffer (p. 842) and Eyal Benvenisti (p. 860).

⁶ See especially the contribution to this Agora by Thomas Grant (p. 823).

detailing the political compromises embodied in these deliberately ambiguous texts. He compares these transitional arrangements for Iraq to those implemented after other recent conflicts and envisions incremental movement toward a terminal point of international recognition and full self-government for Iraq.

David J. Scheffer tackles the vexing problem of the significance of the international law of occupation for the conduct of United States and United Kingdom forces in Iraq. By publicly confirming their status as occupying powers and acknowledging the applicability of occupation law, the United States and the United Kingdom left themselves open, in Scheffer's view, to potentially vast legal exposure for violation of the rules laid down in the Hague and Geneva Conventions governing occupations, even though aspects of that legal regime are unsuited to the kind of transformative role that the occupation authorities have to play in a thoroughgoing reorganization of Iraqi society. Scheffer contends that these legal liabilities could have been avoided or minimized through acceptance of a clearer UN Security Council mandate for the transition.

Finally, *Eyal Benvenisti* takes up the responsibilities of the occupying powers in respect of Iraq's water supply and conflicts with Iraq's neighbors over the allocation of shared resources. Under both classical occupation law and the Security Council resolutions on Iraq (as well as other bodies of law, including the international law of human rights), the occupying powers are required to ensure the supply of clean drinking water and to provide for irrigation and other civilian needs. Iraq's longstanding disputes with Turkey and Syria over utilization of the Tigris and Euphrates rivers raise novel questions concerning authority of the occupant to negotiate and reach durable arrangements on behalf of the people of Iraq.

LORI FISLER DAMROSCH AND BERNARD H. OXMAN*

ENFORCEMENT OF THE COLLECTIVE WILL AFTER IRAQ

[A]rmed force shall not be used, save in the common interest.

—*Preamble, United Nations Charter*

The wounds are still fresh. The smoke has not quite risen from the ashes, yet there it is again, the ghost of change and transformation that shook the Charter system four years ago. This time, however, the air is not filled with solemn proclamations of morality or humanitarian dedication. It is poisoned by doubt and bitterness. The damage to the international legal system is all too visible. The future of Iraq is still uncertain. Furthermore, the argument for the use of force against Iraq is open to challenge as long as there is uncertainty over the existence of Iraqi weapons of mass destruction.

This is a time of skeptics. They tell us that we are witnessing, finally, "the fall of a monument,"¹ the moment when the Charter risks being reduced to "a scrap of paper"² and the collective security system faces collapse.³ Yet it is doubtful whether these somber predictions accurately reflect a new geopolitical reality⁴ or whether they are only signs of temporary

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¹ Jürgen Habermas, *Interpreting the Fall of a Monument*, 4 GER. L.J. 701 (2003), at <<http://www.germanlawjournal.com>>, translated from *Was bedeutet der Denkmalsturz*, FRANKFURTER ALLGEMEINE ZEITUNG, Apr. 17, 2003, at 33.

² Thomas M. Franck, *La Charte des Nations Unies est-elle devenue un chiffon de papier?* LE MONDE, Apr. 2, 2003.

³ Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May/June 2003, at 16, 30–32; see also Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL'Y 539 (2002).

⁴ For doubts, see Anne-Marie Slaughter's critique of Glennon, *Misreading the Record*, FOREIGN AFF., July/Aug. 2003, at 202, 203 ("But in any legal system, international or domestic, breaking the law does not make the law disappear."). See also the earlier assessment by Albrecht Randelzhofer, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS